IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LAND DIVISION)
AT ARUSHA

MISC. LAND APPEAL NO. 13 OF 2020

(C/F from the District Land and Housing Tribunal for Arusha in Land Appeal No. 41 of 2017; Originating from Usa-River Ward Tribunal, Application No. 10 of 2016)

HAMISI WAZIRI ..... APPELLANT

Versus

MWANAIDI SALIMU ..... RESPONDENT

JUDGMENT

10th March & 30th April, 2021

Masara, J.

The Respondent herein sued the Appellant in Usa River Ward Tribunal (the trial Tribunal) in Application No. 10 of 2016. She was claiming for a piece of land measuring 2 acres located at Usa River Madukani Chemchem hamlet, in Arumeru District within Arusha Region (the suit land). The trial Tribunal declared the Respondent the lawful owner of the suit land. The Appellant was dissatisfied by that decision. He appealed to the District Land and Housing Tribunal for Arusha (the Appellate Tribunal), vide Land Appeal No. 41 of 2017. The Appellate Tribunal dismissed the appeal upholding the decision of the trial Tribunal. The Appellant still aggrieved, has preferred this appeal on the following grounds:

a) *That, the trial Tribunal erred both in points of law and fact for holding in favour of the Respondent without considering the evidence that the Appellant's father was awarded the land in dispute by the Court of law way back in 1992 and Respondent had been occupying and using the land since without any disturbance from the Respondent;*

b) That, the trial Tribunal erred in point of law and fact in deciding in favour of the Respondent against the weight of the evidence on record; and

c) That, the trial Tribunal erred in point of law and fact by failing to evaluate and analyse the evidence on record hence reached at an erroneous decision.

At the hearing of the appeal, the Appellant was represented by Mr. Samwel Madulanga, learned advocate, while the Respondent entered appearance through the services of Mr. E. F. Mbise, learned advocate. It was the parties' prayer and the court acceded that the appeal be argued through written submissions.

Submitting in support of the appeal, Mr. Madulanga stated that the dispute traces its history way back in the 1980's, when the dispute was between the late Waziri Ally (the Appellant's father) and Salim Hussein (the Respondent's husband). According to Mr. Madulanga, the Appellant's father sued the Respondent's husband in Usa River Primary Court vide Civil Case No. 42 of 1988, where he was declared the lawful owner of the suit land. The Respondent's husband was aggrieved by that decision, he appealed to Arusha District Court vide Civil Appeal No. 12 of 1990, but his appeal was unsuccessful. On 16/4/1992, the Appellants' father executed the decision of the District Court whereby the suit land was handed to him by the Ward Executive Officer and the Respondent's husband was evicted from the suit land on 22/4/1992. The suit land was later bequeathed to the Appellant by his father prior to his death. The Appellant continued occupying the land without any dispute until 2011, when there emerged a boundary dispute

between him and his neighbour, Wilken Mushi. The dispute was referred to the trial Tribunal vide Application No. 10 of 2011, and it was decided in favour of the Appellant. Execution Application No. 18 of 2014 was filed in the Appellate Tribunal, and a court broker was appointed to execute the decision of the Appellate Tribunal. It is at that stage that When the current dispute arose, whereby the Respondent sued the Appellant for trespassing into the suit land.

According to Mr. Madulanga, there was no evidence that led the trial Tribunal to decide that the suit land belonged to the Respondent. He added that in 2011, it was the same Tribunal that ruled that the Appellant is the lawful owner of the suit land, but it has now gone against its own orders. It was Mr. Madulanga's view that the lower Tribunals did not consider the evidence of the previous decisions that gave ownership of the suit land to the Appellant. Further, the trial Tribunal's decision was reached by votes and not basing on the evidence adduced. He therefore implored the Court to allow the Appeal by quashing the lower Tribunals decisions.

Contesting the appeal, Mr. Mbise contended that the record in the trial Tribunal shows that the dispute was between the Appellant's father and Salim Hussein. There is no record showing that the Respondent has ever been a party to that case. The Respondent filed her claim against the Appellant in the trial Tribunal in 2016, therefore tracing the historical cases that had been taking place since 1992 is not correct since the Respondent was not a party to those cases. Mr. Mbise further stated that the Respondent

was allocated the suit land by the decision of this Court that involved 56 plaintiffs in Civil Case No. 105 of 1990, where all the 56 plaintiffs were allocated pieces of land from the land that was owned by ACU. He was of the view that this Court is functus officio, for it has decided on the very same claim. Mr. Mbise supported the decision of the trial Tribunal stating that it based on strong evidence of the Respondent, likewise the Appellate Tribunal. On that account, he invited the Court to strike out the appeal.

In a brief rejoinder, Mr. Madulanga reiterated that the previous cases he referred involved the same two families over the same subject matter and the dispute was settled. With respect to Civil Case No. 105 of 1990 that was referred to by the counsel for the Respondent, Mr. Madulanga amplified that the case was an application to review dismissal order after the plaintiff failed to enter appearance in this Court.

Having carefully considered the rival submissions by the learned advocates for the parties, and having carefully revisited the record of the lower Tribunals, it is my considered view that determination of this appeal depends on two issues; namely, whether the appeal is competent before this Court and whether the decisions of the two lower Tribunals were justified.

Starting with the first issue, I need to consider the propriety of the decisions of the two lower Tribunals. While revisiting the record of the two lower Tribunals, I came across material irregularities which I feel indebted to address for the purposes of putting the record clear. Ward Tribunals are

governed by the Ward Tribunal's Act, Cap. 206 [R.E 2002] (the Act) and to some extent by the Land Disputes Courts Act, Cap. 216 [R.E 2019] (hereinafter referred to as LDCA). In as much as I am aware that Ward Tribunals regulate their own proceedings, they are not exempted from observing the mandatory requirements of the law. I am also alive that such Tribunals are not bound by the strict rules of evidence. This is provided under section 15 of the Act.

It is imperative to note that the proceedings of the Ward Tribunal must reflect the quorum of the members who presided over a particular matter. While revisiting the record of the trial Tribunal, it is crystal clear that in every day that the Tribunal sat either for hearing or otherwise, the quorum of the members who sat in that particular meeting was not recorded. This is wrong. In the absence of the quorum of the Tribunal members, it will not be clear to trace whether the Tribunal was properly constituted by the prescribed members as stipulated by law. The quorum of the members was just mentioned in the judgment. This was contrary to the law. The names of the members who preside in each particular day of the case has to be recorded, and those members must sign.

The case under scrutiny stayed in the trial Tribunal for almost six months. It was adjourned for more than 15 times including the days the case was heard. In all those days, the names of the members who presided over the case were not recorded. It is on record that while parties were testifying, especially the Respondent and his witnesses, they were examined by the

members of the Tribunal but the examining members were not disclosed. Failure to record the quorum of the members of the trial Tribunal who presided in hearing the case is a fatal irregularity which vitiates the proceedings.

Another anomaly is reflected on the day the Tribunal visited the *locus in quo* on 3/2/2017. On that date, the record shows that the Tribunal members who were present were three. These were Grey Makundi (chairman), Hadija Mnyanyembe (member) and Rogath S. Mrema (member). Gurisha J. Msuya was the secretary. Visiting the *locus in quo*, has the same status as hearing of the case. On that day, the Tribunal has to be constituted as per the law. Composition of the trial Tribunal is provided under sections 4 and 11 of the Act and LDCA respectively. The relevant provisions provide:

> *"4. Composition of Tribunals*
> *(1) Every Tribunal shall consist of-;*
> *(a) not less than four nor more than eight other members elected by the Ward Committee from amongst a list of names of persons resident in the ward compiled in the prescribed manner;*
> *(b) a Chairman of the Tribunal appointed by the appropriate authority from among the members elected under paragraph (a).*
> *(2) There shall be a secretary of the Tribunal who shall be appointed by the local government authority in which the ward in question is situated, upon recommendation by the Ward Committee.*
> *(3) The quorum at a sitting of a Tribunal shall be one half of the total number of members.*
> *(4) At any sitting of the Tribunal, a decision of the majority of members present shall be deemed to be the decision of the Tribunal, and in the event of an equality of votes the Chairman shall have a casting vote in addition to his original vote."*

Section 11 of the LDCA provides:

"11. Each Tribunal shall consist of not less than four nor more than eight members of whom three shall be women who shall be elected by a Ward Committee as provided for under section 4 of the Ward Tribunals Act 1985."

The Court of Appeal decision in ***Adelina Koku Anifa and Another Vs. Byarugaba Alex***, Civil Appeal No. 46 of 2019 (unreported), is instructive in that aspect. It stated:

"... ipso dure, that was contrary to the directives under section 11 of the LDCA which governs the composition of the Ward Tribunals, requiring them to be not less than four in any particular sitting."

From the above authorities, the trial Tribunal is mandated to sit with not less than four members and not more than 8 members. As intimated above, on 3/2/2017, the trial Tribunal was presided over by three members. That is contrary to the dictates of the law. Composition of the Ward Tribunal is not a procedural issue only. It is a legal one. It has to be adhered to strictly. Failure to adhere to the law renders the entire proceedings a nullity.

Next, is the status of the parties in this case. The Appellant claims that the suit land belonged to his father, who is the deceased by now. The same applies to the Respondent who claims that the suit land belonged to her husband who is now the deceased. She claimed that in the judgment that gave the deceased the suit land, her husband was No. 7 in the list of the plaintiffs. Surprisingly, the parties sued in their own capacities, while those who are claimed to be owners of the suit land are both dead. The law requires a person claiming anything on behalf of the deceased to do so in the capacity of an administrator of the estate. In other words, the claim

ought to have been pursued by the administrator/administratrix of the estates of the deceased who are claimed to be owners of the suit land. Suing in their own capacities, the parties herein do not have *locus standi.* In this aspect, I am guided by the decision of the Court of Appeal in ***Anthony Leonard Msanze and Another Vs. Juliana Elias Msanze and 2 Others***, Civil Appeal No. 76 of 2012 (unreported), where the Court substantiated;

> *"In our opinion, in the above-cited paragraphs of the Plaint where the appellants are claiming that they are administrators of the estate of the deceased, manifest cause of action and sufficient interest in the estate of the late Elias Leonard Msanze.* ***Acting under the umbrella of administrators of an estate of deceased person, appellants have prima facie manifested in their Plaint, sufficient interest to sue the respondents."*** (emphasis added)

From the above case, it is apparent that the parties herein did not establish their respective interests on the suit land. None of them proved to be the administrator/administratrix of the estate of the deceased. The claim would therefore be bound to fail. I am aware that the Appellant stated that the suit land was bequeathed to him by his late father before he died. As a Respondent at the trial, his case appears to be different as he was merely dragged into the Court by the Respondent. The Respondent's case is worse as she did not establish her locus to sue.

Further, there is also something in the record of the Appellate Tribunal. I have noted that the opinion of the assessors who sat in the Appellate Tribunal were not read to the parties before the chairman composed the judgment. This is an error that vitiates the proceedings of that Tribunal. It has been held times and again, in a myriad of decisions, that failure to read

opinions of the assessors to the parties before incorporating them in the judgment is a fatal irregularity. See: ***Edina Adam Kibona Vs. Absalum Swebe (Sheli)***, Civil Appeal No. 28 of 2017, ***Sikuzani Saidi Magambo and Another Vs. Mohamed Roble***, Civil Appeal No. 197 of 2018, ***Tubone Mwambeta Vs. Mbeya City Council***, Civil Appeal No. 287 of 2017, and ***Y.S. Chawalla & Co. Ltd Vs. Dr. Abbas Teherali***, Civil Appeal No. 70 of 2017 (all unreported).

I should state here that despite repeated directives made by this Court to land tribunals, the same mistake is repeated by the chairpersons of the tribunals. This error which is not attributable to parties in dispute makes litigating land matters expensive to the parties as they are frequently referred back for retrials. In this appeal, likewise, it is my holding that failure to read the opinion of assessors before composing the judgment by the Appellate Tribunal constituted an incurable irregularity.

From the above analysis, it is worthwhile to note that the appeal was marred with incurable defects in both the trial Tribunal as well as the Appellate Tribunal. The irregularities highlighted contravene the law. There is no way that the merits of this appeal can be determined amidst the aforementioned legal flaws. This Court, being a Court of record, cannot entertain such serious abrogation of the legal procedures. Since the proceedings in both Tribunals were tainted with incurable defects, the appeal at hand cannot stand. From that exposition, this issue is answered in the negative.

Regarding the second issue, I find it impossible to traverse the same given what I endeavoured to state in answer to the first issue. Invariably, the first issue alone is sufficient to dispose this appeal. For the above reasons, and in the exercise of revisional powers conferred to me under section 43(1)(b) of the LDCA, I quash and set aside the proceedings and decisions of both the Appellate Tribunal as well as that of trial Tribunal. Parties are restored to the position they were in before the matter was referred to the trial Tribunal. Any party that may still be interested, is at liberty to file a fresh application before a Tribunal competent to try it. Considering that the ailment discussed hitherto cannot be attributed to either of the parties, I make no orders as to costs.

Order accordingly.

Y. B. Masara

JUDGE

30th April, 2021